88-537

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

PATRICK W. PRICE

APPELLANT

v.

THE CITY OF SAN MARCOS, TEXAS; Emmie Craddock, Mayor; Bill Coddington, Council Member; Gerald Farr, Council Member; Fred Guerra, Council Member; Betty Jane Kissler, Council Member; Gilbert Fulmer, Ethics Review Commission Chairman; Orpha Bazan, Ethics Review Commissioner; Richard Henderson, Ethics Review Commissioner; Mary Helen Moore, Ethics Review Commissioner; W.B. Pryatel, Ethics Review Commissioner; and Stanley Sissom, Ethics Review Commissioner

APPELLEES

ON APPEAL FROM THE SUPREME COURT
OF TEXAS

JURISDICTIONAL STATEMENT

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September 26, 1988

48 pp

QUESTION PRESENTED

Did the courts below err in holding that Appellant Price's First Amendment rights to freedom of speech and to petition for redress of grievances were not violated by the City's action in removing Price from office, pursuant to its "ethics" ordinance, for appearing and speaking before a quasi-judicial body to seek zoning variances on his own property?

PARTIES

PATRICK PRICE
THE CITY OF SAN MARCOS, TEXAS
EMMIE CRADDOCK, MAYOR
BILL CODDINGTON, COUNCIL MEMBER
GERALD FARR, COUNCIL MEMBER
FRED GUERRA, COUNCIL MEMBER
BETTY JANE KISSLER, COUNCIL MEMBER
GILBERT FULMER, ETHICS REVIEW COMMISSION
CHAIRMAN
ORPHA BAZAN, ETHICS REVIEW COMMISSIONER
RICHARD HENDERSON, ETHICS REVIEW COMMISSIONER
MARY HELEN MOORE, ETHICS REVIEW COMMISSIONER
W.B. PRYATEL, ETHICS REVIEW COMMISSIONER
STANLEY SISSOM, ETHICS REVIEW COMMISSIONER

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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PATRICK W. PRICE

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V.

THE CITY OF SAN MARCOS, TEXAS, et. al,

APPELLEES

ON APPEAL FROM THE SUPREME COURT
OF TEXAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Final Summary Judgment of the District Court for the 274th Judicial District, Hays County, Texas is attached in the appendix as Exhibit A-1. The opinion of the Court of Appeals for the Third Supreme Judicial District is reported at 744 S.W.2d 349 and is reproduced as Appendix Exhibit B-1. The Order of the Supreme Court of Texas denying Appellant's Application for Writ of Error is reproduced as Appendix Exhibit C-1, and the Order denying Appellant's Motion for Rehearing is attached as Exhibit C-2.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257 as it is still in effect under Public Law, 100-352, in that this case involves "the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." *See Reinman v. City of Little Rock*, 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915) (municipal ordinance is state statute for purposes of jurisdictional provision). Notice of appeal to this Court was timely filed with the Supreme Court of Texas on September 7, 1988, following that Court's overruling of Appellant's Motion for Rehearing on June 29, 1988. The Order denying the Motion for Rehearing is attached as Appendix Exhibit C-2, and the Notice of Appeal is attached as Appendix Exhibit C-3.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

1) Amendment I to the Constitution of the United States:
Congress shall make no law . . . abridging the freedom of speech . . .; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2) Amendment XIV to the Constitution of the United States:
Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3) Texas Local Government Code § 211.010(d) (formerly Tex. Rev. Civ. Stat. Ann. art. § 1011g):

(d) The [Zoning Board of Adjustment] shall set a reasonable time for the appeal hearing and shall give public notice of the hearing and due notice to the parties in interest. A party may appear at the appeal hearing in person or by agent or attorney. The board shall decide the hearing within a reasonable time.

4) City of San Marcos, Code of Ethics, section 2-73(b):

(b) No officer or employee of the city shall knowingly:

(1) Appear before the body of which the officer or employee is a member as a representative for any private person, including the officer or employee or any member of his/her immediate family, or any group or interest; or represent, directly or indirectly, any private person, including the officer or employee or any member of his/her immediate family, or any group or interest before any department, agency, commission or board of the City of San Marcos.

(2) Represent, directly or indirectly, any private person, including the officer or employee or any member of his/her immediate family, or any group or interest in any action proceeding against the interests of the city or in any litigation in which the city or any department, agency, commission or board thereof is a party.

(3) Represent, directly or indirectly, any other private person, including the officer or employee or any member of his/her immediate family, or any group, or interest in any action of proceeding in the municipal courts of the City of San Marcos which was instituted by a city officer or employee in the course of official duties, or a criminal proceeding in which any city officer or employee is a material witness for the prosecution.

(4) Accept other employment or engage in outside activities incompatible with the full and proper discharge of city duties and responsibilities, or which might impair independent judgment in the performance of said city duties.

(5) No officer or employee shall be deprived of his/her right to due process under the law which would include the right to represent himself/herself in a court proceeding.

STATEMENT OF THE CASE

A. Factual and Statutory Background

Prior to August 27, 1984, Appellant Patrick W. Price ("Price"), served as a duly-appointed member of the City Planning Commission of the City of San Marcos. On that date, the governing body of the City of San Marcos ("the City"), the City Council, upon recommendation from the City Ethics Review Commission, passed a motion removing Price from the City Planning Commission prior to the expiration of his term. See Appendix Exhibit D-1.

The removal of Price from his tenured term was due solely to Price's appearance before the Zoning Board of Adjustment of the City of San Marcos ("Board of Adjustment") to represent himself on two pieces of property he owned. The City Council's motion removing Price from office found that Price was guilty of misconduct by virtue of alleged violations of certain provisions of the City's Ethics Ordinance, Article V of the San Marcos Code, which generally prohibits a member of a City board or commission from appearing before another board or commission, even when only representing himself. Ethics Ordinance 2-73(b)(1). The alleged violations of the Ethics Ordinance involved two instances in which Price represented himself before the City's Zoning Board of Adjustment. In one instance Price appeared before the Board of Adjustment to request a variance from the side yard setback requirement of the City Zoning Ordinance for a carport at his residence homestead. In the other instance, Price appeared before the Board of Adjustment to request a variance from certain parking requirements imposed by the City Zoning Ordinance for a parcel of property that he owns and on which his wife operates a business.

Eight days after the City's action, the City repealed a part of Ethics Ordinance 2-73(b)(1), invoked against Appellant Price, by providing that the "ethics" ordinance did not apply to a person "representing his/her interests in his/her owner-occupied homestead before a board, agency, commission or department of the City of San Marcos other than those of which the officer is a member and those by which the employee is employed." Ordinance of the City Council of San Marcos, Texas, September 4, 1984 (attached as Appendix Exhibit D-3).

The City has cited no reason, either prior to or during the instant proceedings, for Price's removal from office other than his appearances before the Zoning Board of Adjustment.

The relative roles of three departments of the City of San Marcos should be carefully noted. While Price served as a member of the City's Planning Commission, that body is an advisory body to the City Council. *See* City Charter § 7.05 (Appendix Exhibit D-2). The powers of the Planning Commission includes the submission of recommendations and observations to the City Council and the Zoning Commission on all general zoning ordinances, including how these proposals affect the City's comprehensive zoning plan and their environmental impact. In addition, the Planning Commission holds an annual public hearing to review the City's comprehensive zoning plan and submits annually to the City Council and the Zoning Commission recommendations for changes in the City's comprehensive plan. City Charter § 7.06 (Appendix Exhibit D-2). Likewise, the City's Zoning Commission serves as an advisory body to the City Council with respect to zoning and subdivision proposals for the City. City Charter § 7.07 (Appendix Exhibit D-2). Each member of the Zoning Commission and Planning Commission must be residents of San Marcos and own real property in the City.

Unlike the Zoning and Planning Commissions, which are purely advisory bodies to the City Council created by Charter of the City, the Zoning Board of Adjustment is a quasi-judicial body authorized by statute. Tex. Loc. Gov't Code § 211.008-211.011. The Board is authorized "to make special exceptions to the terms of the zoning ordinance that are consistent with the general purpose and intent of the ordinance and in accordance with any applicable rules contained in the ordinance." Tex. Loc. Gov't Code § 211.008(a). The Board of Adjustment consists of five members appointed by the City Council for a term of two years. The City of San Marcos may also provide for appointment of four alternate members to serve when a member of the Board of Adjustment are unable. Tex. Loc. Gov't Code § 211.008(b),(c). The Board of Adjustment may allow a variance from the strict enforcement of the City's zoning laws in favor of an applicant, such as Appellant Price. Tex. Loc. Gov't Code § 211.009(c)(2). A person aggrieved by a Board of Adjustment decision may apply to a State District Court for a writ of certiorari to review the decision. The decision by the District Court is on the evidence presented at the hearing, unless the District Court determines that additional testimony is necessary. Tex. Loc. Gov't Code § 211.011.

As noted, Appellant Price, a member of the City's advisory Planning Commission, sought a zoning variance for two parcels of his own property before the quasi-judicial body, the Board of Adjustment. Solely for speaking in his own behalf before the Board of Adjustment, the City Ethics Commission found him in violation of Ethics Ordinance 2-73(b)(1) on these two occasions and recommended his removal from office. The City Council adopted this recommendation, and these proceedings followed.

B. Course of Proceedings

Following his removal, Price filed his Original Petition in the District Court for the 274th Judicial District of Hays County, Texas. Price's petition alleged that his removal violated, *inter alia,* his right to freedom of speech. Tr. at 10, Plaintiff Original Petition at 8. On the City's Motion for Summary Judgment, and Price's Motion for Partial Summary Judgment, both parties briefed extensively the question of whether the City ordinance and Price's removal violated his First Amendment rights to freedom of speech and to petition for redress of grievances. Brief in Support of Defendants' Motion for Summary Judgment at 3-5, 10, 13-14, Tr. at 124-126, 131, 134-135; Plaintiff Motion for Partial Summary Judgment at 2, Tr. at 172. ("Tr." refers to the Transcript portion of the Record.) The District Court granted the City's Motion for Summary Judgment without opinion. *See* Appendix Exhibit A-1.

On appeal, the Texas Court of Appeals for the Third Supreme Judicial District affirmed. The Court rejected Price's argument that his removal violated the First and Fourteenth Amendments. The Court first held:

> The effect of the City's decision, however, was not to deny Price his statutory right [to represent himself before the Board of Adjustment], but to prevent him from holding office at the same time he chose to exercise this particular right. The issue is whether the City may constitutionally burden Price's office with this restriction. We conclude it may.

744 S.W.2d at 352. The Court then disposed of Price's argument that the City ordinance violated his First Amendment right to freedom of speech:

> Our task is to seek "a balance between the interests of the [appointed official], as a citizen, in commenting upon matters of public concern and the interest of the [City], as an [entity], in promoting the efficiency of the public services it performs through its [officials]." *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 1734-35, 20 L. Ed.2d 811 (1968). If Price's appearances before the Zoning Board "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for" his removal. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 1689, 75 L. Ed.2d 708 (1983).
>
> We conclude Price's appearances before the City Zoning Board were for purely personal reasons. The City did not attempt to inhibit Price's right to speak on matters of public concern and we will not further scrutinize the City's decision to remove Price. We conclude the City imposed a constitutionally permissible restriction on Price's speech for the purpose of effectuating good government. Price's seventh and eighth points of error are overruled.

744 S.W.2d at 353. The Supreme Court of Texas denied Petitioner's Applications for Writ of Error and Price's Motion for Rehearing. Both the Application for Writ of Error and the Motion for Rehearing raised the First Amendment issues.

Appellant Price filed his Notice of Appeal to the Supreme Court of the United States on September 6, 1988. Appendix Exhibit C-3.

SUBSTANTIAL NATURE OF QUESTION PRESENTED

The important principles of constitutional law at stake in this case deserve the plenary consideration of this Court. The courts below have employed an inapplicable balancing analysis which dilutes the constitutional rights of public servants to speak before local governmental agencies. This analysis has been rejected by other courts, and the analysis of the Texas courts is in conflict with the decisions of other jurisdictions.

In light of these significant errors, Appellant respectfully requests this Court to note probable jurisdiction and to schedule the case for plenary consideration.

A. Appellant's Constitutional Right to Appear and Speak Before the Zoning Board of Adjustment, a Local Governmental Agency with Quasi-Judicial Powers, Was Abridged by the City's Action.

This Court has long recognized the constitutional right to petition the Government to defend one's own property and to seek redress of grievances for one's own property. *See* U.S. CONST. Amend. I, XIV. This Court has described the right to petition in bold terms:

> In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship... Equality of treatment in this respect ... is granted and protected by the Federal Constitution.

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148, 28 S. Ct. 34, 35, 52 L.Ed. 143 (1907). This Court has also noted that the constitutional right to appear and to speak before the Government includes appearances before administrative, or quasi-judicial, bodies. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611-12, 30 L. Ed.2d 642 (1972). The right to petition with respect to one's property or business extends to speech before all branches of government. *Id.*

The right to speak is particularly important when the body to which the speech is directed concerns or is before a local agency. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968) (speech concerning local school board). Indeed, local governments decide many of the most vital decisions regarding our homes and families and certainly include the governance of decisions regarding the use of one's property under zoning laws. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S. Ct.114, 71 L. Ed. 303 (1926) (zoning).

Price's speech involved his right to appear and speak before a local constituted body, charged with the responsibility of administering and deciding, in a quasi-judicial manner, variances from zoning ordinances enacted by the City Council. The establishment of such Boards, undoubt-

edly, was to safeguard against possible due process attacks from property owners who could otherwise argue that a zoning ordinance valid on its face was unconstitutional as applied. *See, e.g., Nectow v. City of Cambridge,* 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928).

Because Price chose to exercise his constitutional right to seek redress on his own property – here, a variance from the setback requirements for his home and from certain parking requirements on property that he owned – the City removed him from his position of service to the City. By initially threatening to take such a action through the City Ordinance and by removing him from office, the City clearly abridged his right of free expression before the Zoning Board of Adjustment. *See Keyishian v. Board of Regents,* 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed.2d 629 (1967); *Elrod v. Burns,* 427 U.S. 347, 359, 96 S. Ct. 2673, 2683, 49 L. Ed.2d 547 (1976) (plurality opinion) (threat of dismissal for failure to waive constitutional rights to free speech and association infringes such rights).

B. The City's Infringement of Price's Speech Is Not Justified Because his Speech Addresses Only Matters of "Private Concern."

Both the Texas Court of Appeals and Appellees have maintained that Price's speech addresses only "purely personal" concerns and that it is therefore "unnecessary for [the courts] to scrutinize the reasons for" his removal. 744 S.W.2d at 353 (citing *Connick v. Myers,* 461 U.S. 138, 103 S. Ct. 1684, 1689, 75 L. Ed.2d 708 (1983)). Price respectfully submits that Appellees' and the Texas courts' analysis misapplies *Connick* since (1) *Connick* addresses only the situation in which the employee speaks as an employee about personnel matters (in contrast as to Price's speech which addresses matters unrelated to employment) and (2) *Connick* does not address the right to petition the Government for redress of grievances.

As the Court will recall, *Connick* dealt with an Assistant District Attorney in New Orleans, who, opposed to a proposed job reassignment, prepared and distributed a questionnaire to other Assistant District Attorneys concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. The Court initially noted that the Court should "seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "

461 U.S. at 142, 103 S. Ct. at 1687 (citing *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734). The Court in *Connick* then noted that, for the most part, the questionnaire concerned internal policies of the District Attorney's office. The Court then stated its holding:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, *but instead as an employee* upon matters only of personal interest, a federal court is not the appropriate forum in which to review *the wisdom of a personnel decision* taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State. (emphasis added)

461 U.S. at 147, 103 S. Ct. at 1690. When Price spoke before the Zoning Board of Adjustment, he did not speak "as an employee" concerning "employee grievances," as Sheila Myers did, but instead as a citizen before the one quasi-judicial body appointed by the State to decide variances for his property. This was not an "employee grievance," as was *Connick;* indeed, Price was seeking redress regarding his personal real property.

The Appellees' contention and the holding of the Texas Court of Appeals that Price's removal deserves little scrutiny because his speech involved only "purely personal" concerns belittles the importance of a person's property to both himself and the government of the City. A court case over the title to real property may involve only two litigating parties, but such disputes gave rise to the public common law of real property. So, too, do individual disputes over zoning and variances involve public concerns such as the "public health, safety, morals or general welfare and protec[tion] and preserv[ation of] places and areas of historical, cultural, or architectural importance and significance." Tex. Loc. Gov't Code § 211.001. That the State has chosen to create Zoning Boards of Adjustment and to provide for judicial review of their decisions is strong evidence of the public concern for variance decisions.

Connick and its public/private distinction simply does not apply to Price's speech. The Texas courts' decision also conflicts with those of other jurisdictions which have held specifically that *Connick's* "public concern" analysis does not apply when the employee seeks to redress grievances before a governmental agency. In *McCoy v. Goldin*, 598 F. Supp. 310, 314-15 & n.4 (S.D.N.Y. 1984), the Court noted:

> *[Connick's]* limitation on speech, however, does not apply to the right of access to the courts, the central issue in this case. The right of access to the courts cannot be characterized in terms of "public concern." . . . Thus, an analogy between the situation presented by this case and Connick must fail.

Likewise, the *McCoy* court rejected a balancing of the right to petition with the interests of the government in *Connick*-like fashion:

> Alternatively, defendants would have the court balance the rights of the defendant with the City's interest . . . The right of access to the courts cannot be infringed upon or burdened. It is as fundamental a right as any person may hold. Certainly, the right may not be balanced through a balancing of interests.

Ibid. (citations omitted). In short, Price's speech before the Zoning Board of Adjustment is constitutionally protected since it involves the right to speak on behalf of one's own property. The importance and protection of his speech is not diminished because it involved "purely" his "personal" real property; indeed, as the next section explores, that Price was representing his own property should heighten, not diminish, the scrutiny of the reasons for his removal.

C. The Infringement of Price's Right Is Not Justified by the Alleged State Interest.

As this Court has noted, it is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Frisby v. Schultz*, ____ U.S. ____, 108 S. Ct. 2495, 2499, 101 L. Ed.2d 420, 56 U.S.L.W. 4785 (1988); *Elrod v. Burns*, 427 U.S. at 362, 96 S. Ct. at 2684. The encroachment by the Government on free speech rights "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v.*

Pontikes, 414 U.S. 51, 58, 94 S. Ct. 303, 308, 38 L. Ed.2d 260 (1973). Instead, the asserted interest must be substantial and "one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod v. Burns,* 427 U.S. at 362, 96 S. Ct. at 2684. Further, it is insufficient for the City to show that the means chosen in furtherance of the interest be rationally related to that end. *Id.; see also Sherbert v. Verner,* 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L. Ed.2d 965 (1963). The gain to the subordinating interest provided by the means must outweigh the cost to the protected rights, *Elrod v. Burns,* 427 U.S. at 362, 96 S. Ct. at 2684, and the City must employ those means which are closely drawn to avoid unnecessary infringement of the rights to free speech. *Buckley v. Valeo,* 424 U.S. 1, 25, 96 S. Ct. 612, 637, 46 L. Ed.2d 659 (1976) (per curiam).

On the record in the instant case, the City has failed to make such a demonstration, and instead has rested on its misconception, accepted by the Texas Court of Appeals, that *Connick* frees the Court of any meaningful scrutiny of Price's removal. Nevertheless, the Texas Court of Appeals suggested three interests allegedly served by the City Ordinance, and they are briefly explored here.

The Texas Court of Appeals identified the alleged interests of the City in enacting the ordinance as follows in discussing an equal protection claim argued by Price:

> We further conclude the City's classification of Price (an officeholder) as a person not entitled to represent himself before the City Zoning Board [of Adjustment] is a classification rationally related to the legitimate interests of preventing the appearance of impropriety, conflicts of interests, and self dealing in city government.

744 S.W.2d at 352. The discussion of the First Amendment issue by the Court of Appeals stated only that "the City imposed a constitutionally permissible restriction on Price's speech for the purpose of effectuating good government." 744 S.W.2d at 353.

It is important to note at the outset that the City has not argued that Price's appearance led to any *actual* conflict of interest, self-dealing, or impropriety; the City has chosen to rest on that Price's speaking before the Board *may* have created the *appearance* of such.

The asserted interests by the City are insufficient to meet the heightened scrutiny mandated by the First Amendment. The City ordinance and its enforcement against Price do not substantially serve the asserted state interest of removing the appearance of a conflict of interest or self-dealing. As noted above, the Zoning Board of Adjustment is a quasi-judicial body that decides requests for variances; the Planning Commission, upon which Price served, is an advisory body to the City Council regarding plat approvals and the comprehensive zoning plan. By Texas Law, a planning commission's decision, like the one which Price served, is not reviewed by the Board of Adjustment. *See Lacy v. Hoff*, 633 S.W.2d 605 (Tex. App. - Houston [14th Dist.] 1982, writ ref'd n.r.e.); J. Mixon, *Texas Municipal Zoning Law* ch. 8 (1985). Thus, the City has been unable to articulate how the City ordinance and action reduced the risk of a charge of self-dealing or how an employee like Price could have used his position on the advisory Planning Commission to win a favorable decision before the Zoning Board of Adjustment. The bodies belong to separate branches of the city government – the Planning Commission exercising advisory powers to legislative decisions while the other acting as, essentially, a judicial body.

Nor does it appear that the asserted state interests are otherwise substantially served by the City ordinance and action. As the City itself has argued, Price remained free to present his case before the Board of Adjustment through a mouthpiece, such as an attorney. Presumably, he could be present at the hearing, and he would remain free to present the matter to the Board. The Board would clearly know that Mr. Price was the owner. It is difficult, if not, impossible, to construct a rationale that opportunities for self-dealing and conflicts of interest, or the appearance thereof, are greater when a City employee speaks for himself than when he appears through an advocate and remains present through the proceedings. Whether a City employee spoke for himself or through an attorney, it would be clear to all present that the real party in interest was the City employee. Any interest served by the ordinance is trivial and only ceremonial since the only thing the ordinance does is shut Price up at the hearing. And while the City contends there is an appearance of impropriety in owning property and asserting the right to a variance while a City servant, the City itself is responsible, in part, for this conflict since it requires property ownership as a prerequisite for holding office. *See* City Charter 7.01 (Appendix Exhibit D-2). The lack of any substantial governmental interest served by the impingement on Price's speech is

seen in the City Council's own repeal of the "ethics" ordinance with respect to homesteads – eight days after Price was removed from office.

Any benefits to the asserted governmental interests are heavily "outweigh[ed by] the incurred loss of protected rights." *Elrod v. Burns*, 427 U.S. at 362, 96 S. Ct. at 2684. While Price's inability to speak for himself fails to serve any legitimate state interest, it greatly impinges on his right to speak on behalf of his own property. The ability to speak on one's own behalf before the local citizenry is as old and as traditional a forum as the town meeting. "The colonists [to America] brought with them an appreciation of the values of self-reliance and a traditional distrust of lawyers." *Faretta v. California*, 422 U.S. 806, 826, 95 S. Ct. 2525, 2537, 45 L. Ed.2d 562 (1975). Indeed, Thomas Paine said, "Either party: . . . has a natural right to plead his own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able, . . . therefore the civil right of pleading by proxy, that is, by a counsel, is an appendage to the natural right [of self-representation] . . ." Thomas Paine on a Bill of Rights, quoted in *Faretta*, 422 U.S. at 830 n. 39, 95 S. Ct. at 2538-39 n. 39. The right of self-representation, recognized in the federal courts since the enactment of the Judiciary Act of 1789, has gained the status of constitutional protection in both civil and quasi-judicial contexts. *Blair v. Maynard*, 324 S.E.2d 391 (W. Va. 1984).

The right to speak on one's own behalf in a public forum has long been unquestioned by this Court. Indeed, such restrictions on one's personal speech on his or her own behalf have been invalidated when the asserted governmental interest is an appearance of impropriety. *See Buckley v. Valeo*, 424 U.S. at 52, 96 S. Ct. at 651 (invalidating limits on candidate's expenditures of his own personal funds; "[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and tirelessly to advocate his own election"). Restrictions stifling a speaker from making his own views known, even when that speaker is a governmental employee, impinge not only on the manner of speaking but also of the content of the speech, since only the speaker, inspired by his own personal interest, can effectively state his position. This is particularly true when the public good that the speaker seeks to obtain – for example, a variance of the setback requirement for his homestead – may have little monetary value but is of great personal interest; an attorney working for a fee in such a case may simply not have the same zeal as the cloistered homeowner.

Even assuming the validity of the state interests, the ordinance banning all self-representation by any city employee "is not closely drawn to avoid unnecessary abridgement" of the right to speech. *Buckley v. Valeo,* 424 U.S. at 25, 96 S. Ct. at 638. The ordinance applies in blanket-like fashion to all employees or board members, whether or not there is an actual potential for a conflict of interest or self-dealing. The Texas statute itself provides more closely drawn alternatives that further the alleged City interests more than stifling Price's right to speak on his own behalf. For instance, if some Board members are felt to be too closely aligned with the speaker, alternate members of the Board of Adjustment may be appointed to decide the request for variance. *See* Tex. Loc. Gov't Code § 211.008(c). Further, the requirement that the concurring vote of four of the five members of the Board of Adjustment is necessary to approve a variance minimizes the opportunity for any self-dealing, conflict of interest, or the appearance thereof. Tex. Loc. Gov't Code § 211.009(c). Other contexts do not contain similar provisions. The ABA Canon of Judicial Ethics does not forbid a judge from appearing in his own cause, and certainly no statute, to counsel's knowledge, forbids a governmental employee from another branch of government to appear before the courts in his own behalf.

In sum, the ordinance and action of the City of San Marcos fails to serve substantial governmental interests, and is not narrowly tailored to meet such interests. Any benefits to such interests are substantially outweighed by the impingement on Price's speech.

D. The Texas Courts' Decision Rests on the Outdated Right/Privilege Distinction.

The Texas Court of Appeals' opinion also held, "The effect of the City's decision . . . was not to deny Price his statutory right [to represent himself before the Zoning Board of Adjustment], but to prevent him from holding office at the same time he chose to exercise this particular right." 744 S.W.2d at 352. The Texas Court of Appeals' analysis recalls the epigram of Justice Holmes, who, when serving as a member of the Supreme Judicial Court of Massachusetts, observed, "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517, 517 (1892), *quoted in Connick,* 461 U.S. at 143-44, 103 S. Ct. at 1688. Had the Texas Court of Appeals adopted this position prior to 1967, Price might well have been forced to concede that

the Court of Appeals' opinion rested on applicable United States Supreme Court authority. Before that date, this Court had held, in words fairly echoed by the Texas Court of Appeals in the instant case:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for . . . the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.

Adler v. Board of Education, 342 U.S. 485, 491, 72 S. Ct. 380, 384, 96 L. Ed. 517 (1952). In 1967, however, the Supreme Court of the United States overturned the notion, found in *Adler* and repeated by the court below, that public service could be conditioned on the waiver of important constitutional rights:

> [C]onstitutional doctrine which has emerged since [Adler] has rejected its major premise. That premise was that public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.

Keyishian v. Board of Regents, 385 U.S. 589, 605, 87 S. Ct. 675, 685, 17 L. Ed.2d 629 (1967).

As with its analysis of *Connick*, the Texas Court of Appeals' opinion "got off on the wrong foot," *see* 461 U.S. at 143, 103 S. Ct. at 1688, by starting with the outdated, overruled notion of *Adler* that public employment and service could be conditioned on the surrender of constitutional rights.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the court for their resolution.

Respectfully submitted,

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By Fred B Werkenthin

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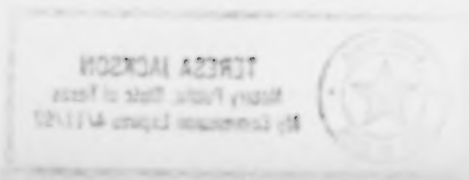
State Bar No. 21182000
Counsel of Record



AFFIDAVIT OF SERVICE

I, William Gary Fowler, a member of the bar of this Supreme Court of the United States, in good standing, and after being duly sworn, depose and say that, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I have served three copies of this Jurisdictional Statement and the Appendix by depositing in a United States mailbox located in Austin, Texas, with first class postage prepaid, addressed to Mr. Thomas H. Crofts, Groce, Locke & Hebdon, 2000 Frost Bank Tower, San Antonio, Texas, on the 26th day of September, 1988.

I further depose and say that, pursuant to Rule 28.4(c) of the Rules of the Supreme Court of the United States, 28 U.S.C. § 2403(b) may be applicable and that three copies of this Jurisdictional Statement and the Appendix thereto have been sent by certified mail, return receipt requested to the Honorable Jim Mattox, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78711 on the 26th day of September, 1988.

By _____

William Gary Fowler
State Bar No. 07329250

SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public, witness to which my hand and official seal.

_____

Notary Public in and for the State of Texas

My Commission Expires: _____

EXHIBIT A-1

CAUSE NO. 14,532

PATRICK W. PRICE	§	IN THE DISTRICT COURT
	§	
VS.	§	274TH JUDICIAL DISTRICT
	§	
THE CITY OF SAN MARCOS, TEXAS, ET AL	§	HAYS COUNTY, TEXAS
	§	

FINAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

On November 26, 1985, the Court heard the cross motions for summary judgment in this cause filed by PATRICK W. PRICE, Plaintiff, and by The City of San Marcos, Emmie Craddock, Bill Coddington, Gerald Farr, Fred Guerra, Betty Jane Kissler, Gilbet Fulmer, Orpha Bazan, Richard Henderson, Mary Helen Moore, W. B. Pryatel, and Stanley Sissom, Defendants. All parties appeared by and through their respective counsel. The Court, after examining the pleadings and the summary judgment evidence and hearing the arguments of counsel, is of the opinion and finds that the Plaintiff's Motion for Partial Summary Judgment in this cause shall be denied. The Court is also of the opinion and finds that the City of San Marcos, et al, all the defendants in this cause, are entitled to summary judgment and therefore the Defendants' motion for summary judgment shall be granted in all things.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Plaintiff's motion for partial summary judgment be in all things denied;

IT IS FURTHER ORDERED that the motion for summary judgment of the Defendants City of San Marcos, et al, be, and the same is hereby, granted in all things, and Judgment is entered that Plaintiff, PATRICK W. PRICE, take nothing against any of the defendants in this cause and

that defendants recover all costs in their behalf expended of and from Plaintiff, PATRICK W. PRICE, for which let execution issue.

SIGNED this 25th day of March, 1986.

/s_____
Judge Presiding

EXHIBIT B-1

Patrick W. Price, Appellant,

v.

City of San Marcos, et al, Appellees

No. 14720.

Court of Appeals of Texas, Austin,

Jan. 20, 1988.

Rehearing Denied Feb. 17, 1988.

Before POWERS, GAMMAGE and ABOUSSIE, JJ.

GAMMAGE, Justice.

Patrick W. Price ("Price") sued the City of San Marcos and certain public officials (collectively, the "City") alleging he was illegally removed from the City Planning Commission and defamed in the process of his removal. Price now appeals from summary judgment rendered in favor of the City. We affirm the judgment.

On August 27, 1984, the City removed Price from its Planning Commission because he twice represented himself before the City Zoning Board in violation of an ethics ordinance. The ordinance in question, section 2-73(b) of the City's Code of Ethics, essentially prohibits all City officials from appearing before any commission or board of the City, even when representing themselves. While a member of the City Planning Commission, Price appeared before the Zoning Board to request a variance for a carport to be built at his residence and to request a variance from parking requirements at his wife's dress shop.

In his first and third points of error, Price complains that the district court erred in granting the City's motion for summary judgment because he was deprived of his office without due process of law in violation of

U.S. Const. amends. V, XIV, § 1 and Tex. Const.Ann. art. I, § 19 (1984).

We must first determine if Price was deprived of property or liberty deserving of the protection of the state and federal constitutions. *Tarrant County v. Ashmore,* 635 S.W.2d 417, 422 (Tex.1982), *cert. denied,* 459 U.S. 1038, 103 S.Ct. 452, 74 L.Ed.2d 606 (1982). We hold "an officer's interest in his [appointed] position, though not 'property' in the conventional sense, is a recognizable interest for purposes of ... due process analysis." *See id.*

For substantive due process analysis, we note the right to hold office is not a fundamental right subject to heightened scrutiny. Consequently, under both the Texas and federal constitutions we must determine only whether the application of the ethics statute to Price and his subsequent removal were means rationally related to a legitimate end. *Massachusetts Indemnity and Life Insurance Co. v. Texas State Board of Insurance,* 685 S.W.2d 104, 113-14 (Tex.App.1985, no writ).

Under Tex.Rev.Civ.Stat.Ann. art 1006 (1963), the City has the power to remove Price for misconduct in office, "after due notice and an opportunity to be heard in his defense." Price admitted violating the ethics ordinance by appearing before the Zoning Board while he was a member of the Planning Commission. We conclude the City's goals of preventing the appearance of impropriety, conflicts of interest, and self-dealing in local government – all legitimate ends – were rationally related to and achieved by applying the ethics ordinance to Price and his removal from office under art. 1006. Price was not deprived of his office without substantive due process.

Under procedural due process we must determine if Price was deprived of his office in a fundamentally unfair manner. *Haug v. Franklin,* 690 S.W.2d 646, 649 (Tex.App.1985, no writ) ("What constitutes 'fundamental fairness' in context is an inference drawn from the totality of the facts in the particular case in light of reason, precedent, history, the private interest at stake, the government's interest, and the risk that the procedures employed will lead to erroneous decisions.") "At a very basic level, deprivation of a protected interest requires notice and an opportunity to be heard. The type of notice and hearing required varies according to the facts of the situation." *Tarrant County,* 635 S.W.2d at 423.

Price was apparently given notice of a City Council meeting where his removal would be discussed and where he could respond. Price argues he was entitled to a trial-type hearing because he was removed for misconduct. *See Id.* at n. 6. We disagree. In *Tarrant County,* a number of justices of the peace were removed from office by county commissioners pursuant to a redistricting plan. The Texas Supreme Court concluded the justices did not deserve trial-type hearings before they could be removed because their removal was purely a policy decision and did not require the determination of adjudicative facts. *Id.* Although the Supreme Court suggested a trial-type hearing would be required to remove an officer for cause, the determining factor is whether adjudicative facts must be adduced prior to the removal. *Id.*

In Price's case, there were no adjudicative facts to determine. He unequivocally admitted violating the ethics ordinance and contended he had an absolute right to represent himself before the Zoning Board. We conclude the City Council's decision to apply the ethics ordinance to Price and remove him from office was purely a legislative decision that did not require a trial-type hearing.

Price further argues he was denied procedural due process because the City Council chose to remove him under Tex.Rev.Civ.Stat.Ann. art. 1006 (1963) instead of prosecuting him for a Class C misdemeanor under the enforcement provisions of the ethics ordinance. We see no constitutional violation in choosing one allowable enforcement procedure over another.

Price finally argues he was denied procedural due process because the City Council's decision to remove him was arbitrary and capricious. Under Tex.Rev.Civ.Stat.Ann. art 1011g(f) (Pamp.Supp.1987), "any party may appear in person" before a zoning board. Price contends it was arbitrary and capricious to remove him for exercising such a statutory right. The effect of the City's decision, however, was not to deny Price his statutory right, but to prevent him from holding office at the same time he chose to exercise this particular right. The issue is whether the City may constitutionally burden Price's office with this restriction. We conclude it may. The City's action was not arbitrary and capricious and Price was not deprived of his office without procedural due process. Price's first and third points of error are overruled.

In his second and fourth points of error Price complains the district court erred in granting the City's motion for summary judgment because he was deprived of his liberty without due process of law. We disagree.

Again, we must first determine if Price was deprived of liberty deserving the protection of the state and federal constitutions. *Tarrant County,* 635 S.W.2d at 422. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). This so-called "stigmatization" generally requires publicized name-calling and a change of status. *Paul v. Wood,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (a right previously recognized by state law must be extinguished or altered or every defamatory statement by the government would be a constitutional violation). While we conclude Price's liberty interests have been implicated because he was removed from office in a public manner for alleged misconduct, we overrule his second and fourth points for the same reasons we overrule his due process points one and three.

In his fifth and sixth points of error, Price complains the district court erred in granting the City's motion for summary judgment because he was denied equal protection under the law. We must again disagree.

"When the classification created by a ... regulatory scheme neither infringes upon fundamental rights or interests nor burdens an inherently suspect class, equal protection analysis requires that the classification be rationally related to a legitimate [government] interest." *Spring Branch I.S.D. v. Stamos,* 695 S.W.2d 556, 559 (Tex.1985). We conclude Price is not a member of a suspect class and does not have a fundamental right to hold office. We further conclude the City's classification of Price (an officeholder) as a person not entitled to represent himself before the City Zoning Board is a classification rationally related to the legitimate interests of preventing the appearance of impropriety, conflicts of interests, and self-dealing in city government. Price's fifth and sixth points of error are overruled.

In his seventh and eighth points of error, Price complains the district court erred in granting the City's motion for summary judgment because the City's actions denied Price his right of free speech. We disagree.

Our task is to seek "a balance between the interests of the [appointed official], as a citizen, in commenting upon matters of public concern and the interest of the [City], as an [entity], in promoting the efficiency of the public services it performs through its [officials]." *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968). If Price's appearances before the Zoning Board "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for" his removal. *Connick v. Myers,* 461 U.S. 138, 103 S.Ct.1684, 1689, 75 L.Ed.2d 708 (1983).

We conclude Price's appearances before the City Zoning Board were for purely personal reasons. The City did not attempt to inhibit Price's right to speak on matters of public concern and we will not further scrutinize the City's decision to remove Price. We conclude the City imposed a constitutionally permissible restriction on Price's speech for the purpose of effectuating good government. Price's seventh and eighth points of error are overruled.

Because the district court's judgment is sustainable on all points discussed, it is unnecessary for us to address Price's ninth point of error.

In his tenth point of error, Price complains the district court erred in granting the City's motion for summary judgment on his defamation claim because genuine issues of material fact may still remain. Although genuine issues of material fact may still remain on Price's defamation claim, we conclude he has waived his right to that complaint on appeal.

Price broadly pleaded the City had defamed him. At the hearing on the motions for summary judgment, the City contended that any statements it made in this connection were privileged. Price now claims some statements made by the City were not privileged because they were made outside the confines of the City Council chambers, but nowhere in the record do we find Price raised such a contention in the trial court. In a summary judgment proceeding, "issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." Tex.R.Civ.P.Ann. 166-A(c) (Supp.1987). It was not the City's responsibility to "negate all possible issues of law and fact that *could* be raised ... in the trial court but were not." *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671,

678-79 (Tex.1979) (emphasis in original). We overrule Price's tenth point of error.

We affirm the judgment of the trial court.

EXHIBIT C-1

IN THE SUPREME COURT OF TEXAS

May 18, 1988

NO. C-7320

PATRICK W. PRICE	§	
	§	From HAYS County,
	§	
vs.	§	THIRD District.
	§	
	§	
THE CITY OF SAN MARCOS ET AL	§	

Application of petitioner for writ of error to the Court of Appeals for the Third District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, Patrick W. Price, and surety, North River Insurance Company, pay all costs incurred on this application.

EXHIBIT C-2

June 29, 1988

NO. C-7320

PATRICK W. PRICE	§	
	§	From HAYS County,
	§	
vs.	§	THIRD District.
	§	
	§	
THE CITY OF SAN MARCOS ET AL	§	

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

EXHIBIT C-3

THE SUPREME COURT OF THE STATE OF TEXAS
NO. C-7320

FILED SUPREME COURT OF TEXAS
SEPTEMBER 7, 1988

PATRICK W. PRICE,

Petitioner-Appellant

vs.

THE CITY OF SAN MARCOS, TEXAS; EMMIE CRADDOCK; BILL CODDINGTON; GERALD FARR; FRED GUERRA; BETTY JANE KISSLER; GILBERT FULMER; ORPHA BAZAN; RICHARD HENDERSON; MARY HELEN MOORE; W.B. PRYATEL; STANLEY SISSOM,

Respondents-Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Patrick W. Price, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Texas overruling Petitioner-Apellant's timely motion for rehearing of the denial of writ of error, entered herein on June 29, 1988, pursuant to 28 U.S.C. § 1257, as it is still in effect, pursuant to Public Law 100-352.

Respectfully submitted,
Fred B. Werkenthin
Charles F. Herring, Jr.
James M. Nias
William Gary Fowler
SMALL, CRAIG & WERKENTHIN
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512/472-8355

By /s_____
William Gary Fowler
State Bar No. 07329250

OF COUNSEL
SMALL, CRAIG & WERKENTHIN

CERTIFICATE OF SERVICE

I, William Gary Fowler, after being duly sworn, depose and say that pursuant to Rule 28.4(a) of the Rules of the Supreme Court of the United States, I have served the Notice of Appeal to the Supreme Court of Texas upon all counsel of record in this case by sending a copy thereof in an envelope, sent certified mail, return receipt requested, addressed to Thomas H. Croafts, Jr., Groce, Locke & Hebdon, 2000 Frost Bank Tower, San Antonio, Texas, on the 6th day of September, 1988. I further depose and say that this Notice has been filed with the Supreme Court of Texas and a copy with the Court of Appeals for the Third Supreme Judicial District, which is the Court possessed of the record.

/s _____
WILLIAM GARY FOWLER

SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public, witness to which my hand and official seal.

Kerri D. Rench
Notary Public in and for
the State of Texas

My Commission Expires: 5-14-90

EXHIBIT D-1

IN THE MATTER OF	§	BEFORE THE ETHICS REVIEW
	§	COMMISSION
PAT PRICE	§	CITY OF SAN MARCOS, TEXAS

FINDINGS AND DECISION OF THE ETHICS REVIEW COMMISSION

On the 9th day of August, 1984, the Ethics Review Commission of the City of San Marcos, Texas, conducted a hearing into allegations against Pat Price that he had violated Section 2-73(b)(1) of the Code of Ethics of the City of San Marcos which reads in pertinent part:

> "No officer or employee of the City shall knowingly; (1)...represent, directly or indirectly, any private person, including the officer or employee or any member of his/her immediate family, or any group or interest before any department, agency, commission or board of the City of San Marcos."

The Ethics Review Commission also considered a possible violation of Section 2-73(b)(2) of the Ethics Ordinance which prohibits personal representation by an officer of the City "...in any action or proceeding against the interest of the City..."

The Ethics Review Commission Hearing was conducted pursuant to Article 12, Section 12.02(c) of the Charter of the City of San Marcos and pursuant to the Ethics Review Commission's Rules and Procedures.

The City was represented by City Attorney Lamar Hankins. Pat Price was present and was represented by his attorney, Jim Nias. Mr. Hankins presented copies of minutes of the Zoning Board of Adjustments and Appeals meetings for April 10, 1984 and May 8, 1984. The evidence revealed that on April 10, 1984, Pat Price, a member of the City Planning Commission, represented himself before the Zoning Board of Adjustments in regard to a variance request for a carport at his home at 838

Loop Street. The evidence showed further that Pat Price represented himself before the Zoning Board of Adjustments on May 8, 1984 in regard to a variance request for business property located at 302 University.

Mr. Nias then addressed the Ethics Review Commission on behalf of Pat Price. He presented no evidence to contradict the allegations but instead argued that representation before the Zoning Board of Adjustments and Appeals should be permitted since representation of one's interest before a "Court" is not precluded by the Ethics Ordinance. Mr. Hankins made arguments in rebuttal stating that while hearings before the Zoning Board of Adjustments and Appeals are "quasi-judicial" in nature, the Zoning Board of Adjustments itself is not a "Court" as that is defined in State law. The Attorneys made several arguments and counter-arguments. Both sides then concluded their presentations. The Ethics Review Commission then went into private deliberations outside the hearing room before returning and announcing their decision.

The Ethics Review Commission found that Pat Price did violate Section 2-73(b)(1) in that he represented himself on at least two occasions before the Zoning Board of Adjustments while serving as a member of the Planning Commission.

Gilbert Fulmer, Chair of the Ethics Review Commission, announced that it was the unanimous decision of those Commission members in attendance at the hearing to recommend to the City Council that Pat Price be removed from his position on the Planning Commission.

Issued and approved by:

/s _____ 8/16/84
Gilbert Fulmer, Chair of the Ethics Review Commission — Date

/s _____ 8/17/84
Orpha Bazan, Member of the Ethics Review Commission — Date

/s _____ 8/17/84
Richard Henderson, Member Date
of the Ethics Review Commission

/s _____ 8/17/84
Mary Helen Moore, Member Date
of the Ethics Review Commission

/s _____ 8/16/84
William Pryatel, Member Date
of the Ethics Review Commission

/s _____ 8/17/84
Stanley Sissom, Member Date
of the Ethics Review Commission

EXHIBIT D-2

ARTICLE VII, MUNICIPAL PLANNING AND ZONING

Section 7.01. Planning and zoning commission.

The council shall appoint a city planning commission and a city zoning commission by the beginning of the fiscal year 1982-83, each consisting of seven (7) members who shall be residents of and own real property in the city and serve without compensation.

An ordinance shall be adopted by the council before appointing new members to ensure broad representation and expertise on both commissions.

Two (2) persons may serve on both commissions.

On the effective date, members of the former planning and zoning commission shall be given the opportunity to serve their unexpired terms on at least one of the new commissions. (Amend. of 8-10-81)

Section 7.02. Term of office.

Members shall be appointed for a three-year term with one-third to be appointed each year on a continuing basis. (Amend of 8-10-81)

Section 7.03. Vacancies.

Vacancies occurring in the commissions shall be filled within thirty (30) days by the council for the remainder of the unexpired term. (Amend. of 4-9-79; Amend. of 8-10-81)

Section 7.04. Organization.

The commissions each shall elect a chairperson from its membership annually, and shall establish rules of procedure which shall include the following:

(a) A quorum shall consist of a majority of the membership.

(b) The chairperson shall be entitled to vote upon any question.

(c) Minutes shall be kept of the proceedings of the commission and shall be a public record.

(d) All meetings shall be open to the public. (Amend. of 4-2-77; Amend. of 4-9-79; Amend. of 8-10-81)

Section 7.05. Powers and duties of both commissions.

The commissions shall have the power and be required to:

(a) Be responsible to and act as an advisory body to the council.

(b) Require information from the other administrative units of the city government in relation to its work.

(c) Perform such other duties and be vested with such other powers as the council may prescribe in accordance with the laws of the State of Texas. (Amend. of 8-10-81)

Section 7.06. Powers and Duties of the Planning Commission.

Planning Commission shall have the power and be required to:

1. Submit recommendations and observations to the City Council on all proposals including a determination of:

   a. Compliance with the Master Plan and
   b. Environmental Impact Statements;

2. Hold an annual Public Hearing to review the Master Plan;

3. Submit annually to the City Council and the Zoning Commission not less than one hundred twenty (120) days prior to the beginning of the fiscal year, a list of recommended changes, if any, in the Master Plan;

4. Review all plans for platting and subdividing of land within the City and within adjacent areas as permitted by law;

5. Hold an annual Public Hearing to review the Subdivision Ordinance;

6. Submit annually to the City Council not less than one hundred twenty (120) days prior to the beginning of the fiscal year, a list of recommended capital improvements found necessary or desirable; and

7. Request, respond and receive from the Zoning Commission any recommendations or determinations on any proposal.

Section 7.07. Powers and Duties of the Zoning Commission.

Zoning Commission shall have the power and be required to:

1. Recommend to the City Council approval or disapproval of proposed changes in the Zoning Plan;

2. Hold an annual Public Hearing to review the Zoning Ordinance; and

3. Request, respond and receive from the Planning Commission any recommendation or determinations on any proposal.

Section 7.08. The Master Plan.

The Master Plan for the physical development of the City of San Marcos shall contain the recommendations of the Planning Commission for growth, development and beautification of the City. The Council may amend the Master Plan after at least one public hearing on the proposed action; provided, however, that it shall take a three-fourths (3/4) vote of all the members of the legislative body of the City of San Marcos to overrule a recommendation of the Planning Commission pertaining to a proposed amendment of the Master Plan. The Council shall not act on any amendment affecting the Master Plan unless and until a recommendation on said amendment is received from the Planning Commission.

EXHIBIT D-3

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS, AMENDING SECTION 2-73(b)(1) OF DIVISION 1 OF ARTICLE V. CODE OF ETHICS OF CHAPTER 2 OF THE CODE OF ORDINANCES OF THE CITY OF SAN MARCOS, TEXAS TO DELETE THE PORTION OF SUCH SECTION WHICH PROHIBITS CITY OFFICERS AND EMPLOYEES FROM REPRESENTING THEMSELVES AND OTHERS BEFORE OTHER CITY DEPARTMENTS, AGENCIES, COMMISSIONS OR BOARDS; AMENDING SECTION 2-73(b)(3) OF SAID DIVISION OF SAID ARTICLE OF SAID CHAPTER OF SAID CODE TO DELETE THE PORTION OF SUCH SECTION WHICH PROHIBITS CITY OFFICERS AND EMPLOYEES FROM REPRESENTING THEMSELVES AND OTHERS IN MUNICIPAL COURT PROCEEDINGS INSTITUTED BY CITY OFFICERS OR EMPLOYEES IN THE COURSE OF OFFICIAL DUTIES; AMENDING SECTION 2-73 OF SAID DIVISION OF SAID ARTICLE OF SAID CHAPTER OF SAID CODE TO DELETE SECTION 2-73(b)(5); AMENDING SECTION 2-73 OF SAID DIVISION OF SAID ARTICLE OF SAID CHAPTER OF SAID CODE TO ADD SUBSECTIONS (c), (c)(1) AND (c)(2) TO ALLOW CITY OFFICERS AND EMPLOYEES TO REPRESENT THEIR OWN INTERESTS IN OWNER-OCCUPIED HOMESTEAD BEFORE OTHER CITY BOARDS, AGENCIES, COMMISSIONS OR DEPARTMENTS AND TO REPRESENT OTHERS BEFORE OTHER BOARDS, AGENCIES, DEPARTMENTS OR COMMISSIONS IN MATTERS OF PURELY CIVIC OR PUBLIC CONCERN WITHOUT COMPENSATION THEREFOR; AMENDING SECTION 2-73 OF SAID DIVISION OF SAID ARTICLE OF SAID CHAPTER OF SAID CODE TO ADD SUBSECTIONS (d); (d)(1) AND (d)(2) TO PROHIBIT THE MAYOR AND CITY COUNCIL MEMBERS FROM REPRESENTING THEMSELVES OR OTHERS AND PROHIBITING OTHER CITY OFFICERS AND EMPLOYEES FROM REPRESENTING ANYONE OTHER THAN THEMSELVES IN MUNICIPAL COURT PROCEEDINGS INSTITUTED BY CITY OFFICERS AND EMPLOYEES IN THE COURSE OF OFFICIAL DUTIES: AMENDING SECTION 2-73 OF SAID DIVISION OF SAID ARTICLE OF SAID CHAPTER OF SAID CODE TO ADD SUBSECTION (e) TO PROVIDE THAT NO CITY OFFICER OR EMPLOYEE SHALL BE DEPRIVED OF DUE PROCESS RIGHTS; AMENDING SECTION 2-81 OF DIVISION 2 OF SAID

ARTICLE OF SAID CHAPTER OF SAID CODE TO AMEND THE DEFINITION OF "CITY OFFICIAL"; AND DECLARING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS:

SECTION 1. That Section 2-73(b)(1) of Division 1 of Article V. Code of Ethics of Chapter 2 of the Code of Ordinances of the City of San Marcos, Texas is hereby amended to read as follows:

Sec. 2-73. Standards of conduct.

...

(b) No city officer or employee shall knowingly:

(1) Appear before the body of which the officer or employee is a member as a representative for any private person, including the officer or employee or any member of his/her immediate family or any group or interest.

...

SECTION 2. That Section 2-73(b)(3) of Division 1 of Article V. Code of Ethics of Chapter 2 of the Code of Ordinances of the City of San Marcos, Texas is hereby amended to read as follows:

Sec. 2-73. Standards of conduct.

...

(b) No city officer or employee shall knowingly:

...

(3) Represent, directly or indirectly, any other private person, including the officer or employee or any member of his/her immediate family, or any group, or interest in a criminal proceeding in which any city officer or employee is a material witness for the prosecution.

...

SECTION 3. That Section 2-73 of Division 1 of Article V. Code of Ethics of Chapter 2 of the Code of Ordinances of the City of San Marcos, Texas is hereby amended to delete Section 2-73(b)(5) in its entirety.

SECTION 4. That Section 2-73 of Division 1 of Article V. Code of Ethics of Chapter 2 of the Code of Ordinances of the City of San Marcos, Texas is hereby amended to add subsections (c), (c)(1) and (c)(2) which shall read as follows:

Section 2-73. Standards of conduct.

...

(c) No officer or employee shall knowingly represent, directly or indirectly, any private person including the officer or employee or any member of his/her immediate family, or any group or interest before any department, agency, commission or board of the City of San Marcos, except as follows:

(1) No officer or employee shall be prohibited from representing his/her interests in his/her owner-occupied homestead before a board, agency, commission or department of the City of San Marcos other than those of which the officer is a member and those by which the employee is employed.

(2) No officer or employee shall be prohibited from representing a private person, group or interest before a board, agency, department or commission of the City of San Marcos, other than those of which the officer is a member and those by which the employee is employed, in matters of purely civic or public concern when doing so without compensation or remuneration.

...

SECTION 5. That Section 2-73 of Division 1 of Article V. Code of Ethics of Chapter 2 of the Code of Ordinances of the City of San Marcos, Texas is hereby amended to add subsections (d), (d)(1) and (d)(2) which shall read as follows:

Sec. 2-73. Standards of conduct.

...

(d) In any action or proceeding in the municipal courts of the City of San Marcos which was instituted by a city officer or employee in the course of official duties,

(1) No City Council member, including the mayor, shall knowingly represent any private person, including him/herself or any member of his/her immediate family, or any group or interest.

(2) No city officer or employee, other than the mayor and city council members, shall knowingly represent any private person other than him/herself, including any member of his/her immediate family, or any group or interest; but said officer or employee is not prohibited from representing him/herself in said municipal court action or proceeding.

SECTION 6. That Section 2-73 of Division 1 of Article V. Code of Ethics of Chapter 2 of the Code of Ordinances of the City of San Marcos, Texas is hereby amended to add subsection (e) which shall read as follows:

Sec. 2-73. Standards of conduct.

...

(e) No officer or employee shall be deprived of his/her right to due process under the law which would include the right to represent himself/herself in a court proceeding, except as provided in this ordinance.

SECTION 7. That the definition of "City official" in Section 2-81 of Division 2 of Article V. Code of Ethics of Chapter 2 of the Code of Ordinances of the City of San Marcos, Texas is hereby amended to read as follows:

Sec. 2-81. Definitions.

City official: The mayor, every member of the city council, the city manager, the city attorney, the city secretary, judges of the municipal

court, and persons acting in the capacity of the aforementioned officers or employees. If the job title of city manager, city attorney, city secretary and judges of the municipal court or any of them are changed, the term "city official" shall include the persons charged with the duties of the listed positions.

SECTION 8. That this Ordinance shall be in effect ten (10) days from and after its passage and after its publication in a newspaper of general circulation in the area.

PASSED AND APPROVED on first reading August 13, 1984.

PASSED AND APPROVED on second reading August 27, 1984.

PASSED, APPROVED AND ADOPTED September 4, 1984.

Emmie Craddock
Mayor

Attest:

Janis K. Womack
City Secretary

Approved:

Lamar W. Hankins
City Attorney

Published in the DAILY RECORD September 9, 1984.

No. 88-537

(2)

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICK W. PRICE,

Appellant,

v.

THE CITY OF SAN MARCOS, TEXAS; EMMIE CRADDOCK, MAYOR; BILL CODDINGTON, COUNCIL MEMBER; GERALD FARR, COUNCIL MEMBER; FRED GUERRA, COUNCIL MEMBER; BETTY JANE KISSLER, COUNCIL MEMBER; GILBERT FULMER, ETHICS REVIEW COMMISSION CHAIRMAN; ORPHA BAZAN, ETHICS REVIEW COMMISSIONER; RICHARD HENDERSON, ETHICS REVIEW COMMISSIONER; MARY HELEN MOORE, ETHICS REVIEW COMMISSIONER; W. B. PRYATEL, ETHICS REVIEW COMMISSIONER; and STANLEY SISSOM, ETHICS REVIEW COMMISSIONER,

Appellees.

On Appeal from the Supreme Court of Texas

MOTION TO DISMISS OR AFFIRM

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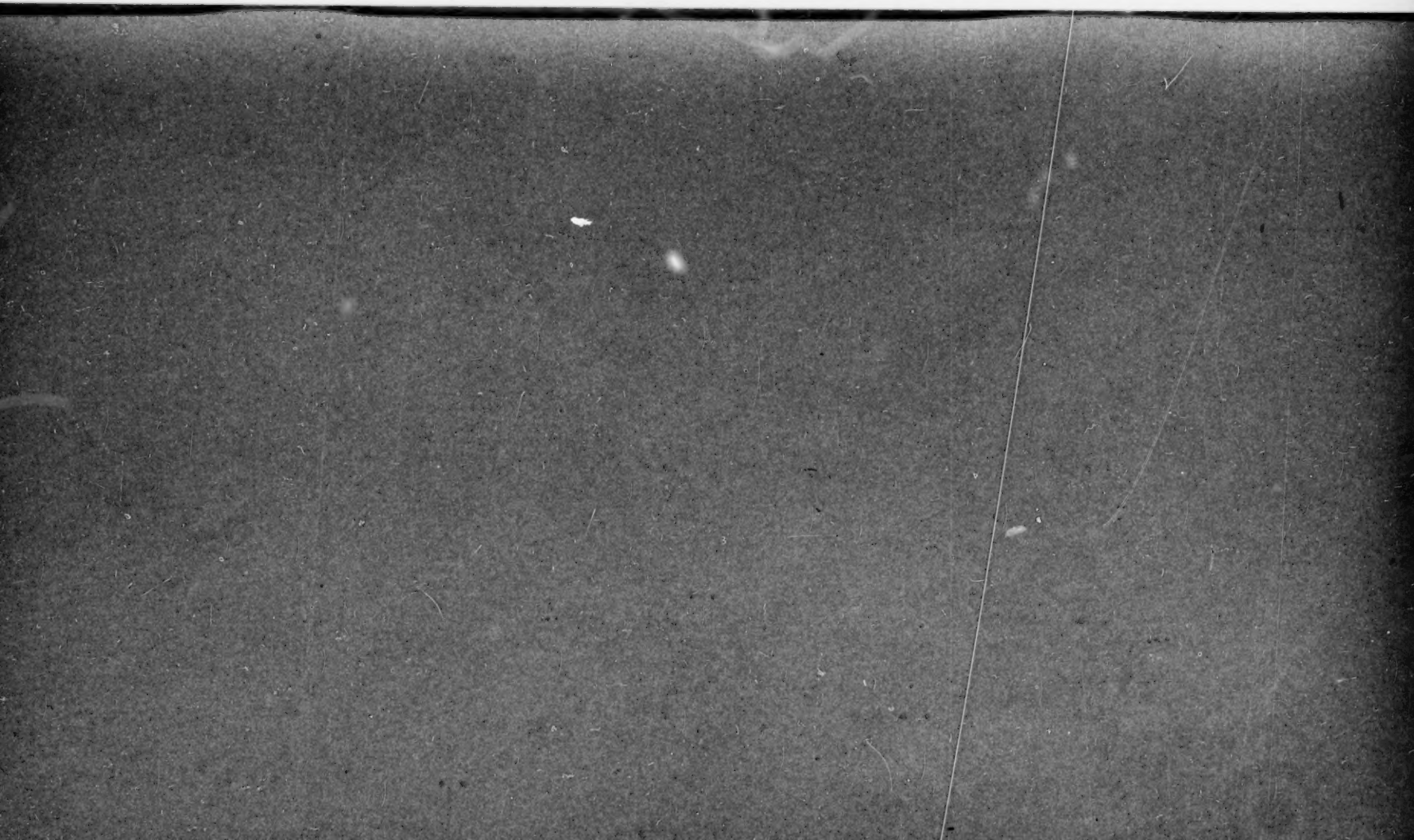

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-537

PATRICK W. PRICE,

Appellant,

v.

THE CITY OF SAN MARCOS, TEXAS, *et al.*,

Appellees.

On Appeal from the Supreme Court of Texas

MOTION TO DISMISS OR AFFIRM

Appellees respectfully move the court to dismiss this appeal or to affirm the Texas court's judgment on the following grounds:

1. The Question Presented is not within the Court's appeal jurisdiction, and, since Price's First Amendment argument was resolved in the courts below by an interpretation of state law, the case is not within writ of certiorari jurisdiction;

2. The Texas court's decision does not present a substantial federal question;

3. The Texas court's decision is in conformity with prior decisions of this Court.

STATEMENT OF FACTS

Appellant Patrick W. Price was an appointed member of the Planning and Zoning Commission for the City of San Marcos ("City"). City's Code of Ethics contained an ordinance prohibiting an official in Price's position from appearing before any other city agency. *See* Jurisdictional Statement 3. Price's individual appearance before City's Board of Adjustment to request personal zoning changes led City's Ethics Review Commission to recommend to the City Council that Price be removed from the commission. *See* Jurisdictional Statement Exhibit D-1. The reason for the commission's recommendation, which the City Council adopted, was explained in the deposition of the Chairman of the Ethics Commission:

> Q. In Mr. Price's case, you did feel it was serious enough to warrant his removal from the Planning Commission?
>
> A. What we felt was serious enough to warrant it—and I think it's important to make this clear—was that Mr. Price not only violated the ordinance, but that he insisted that it was permissible for him to do so. We had had prior cases in which we had people who had violated the ordinance inadvertently, admitted to having done so, apologized and assured us that they would never do it again and we felt that the apology and the promise not to repeat was sufficient.
>
> In this case, *we were concerned with setting a precedent in which members of the city government would feel that they were not bound by the City's ordinance.* (Deposition of Gilbert Fulmer; emphasis added).[1]

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[1] The mayor testified that one of Price's two violations did not figure into the city council's decision, because the council had already decided to amend the ethics ordinance to permit an official's appearance concerning homestead property. (Deposition of Emmie Craddock). The amended ordinance, which demonstrates the nonrecurring nature of that part of the controversy, is printed as Exhibit D-3 in the Jurisdictional Statement.

Price sued City and members of the Ethics Review Commission and the City Council claiming that he was entitled to damages for defamation and civil rights violation and to reinstatement on the commission.

Although it is the role of the Ethics Ordinance (vis-a-vis First Amendment rights) that supposedly vests this court with appeal jurisdiction under 28 U.S.C. § 1257(2), Price's trial pleading said:

> Plaintiff does not complain of the City's Code of Ethics as written. Plaintiff would show, however, that with respect to representation of oneself before the Board of Adjustment, the prohibition against pro se representation contained in . . . the Code of Ethics . . . *does not apply as a matter of State law.* (Tr. 162; emphasis added).

With regard to the First Amendment, Price pleaded only the conclusion that the City's action in removing him from the City Planning Commission "denied him his right to freedom of speech." (Tr. 167). Price identically confined his position in reply to City's motion for summary judgment:

> Plaintiff does not seek to have the City's Code of Ethics as written, or any part thereof as written, declared unconstitutional. Plaintiff's contention is that Defendants have erroneously, improperly and unlawfully applied an otherwise valid ordinance to Plaintiff under the undisputed facts and circumstances of this case. (Tr. 176).

Relevant excerpts from Price's trial pleading are printed as Appendix A to this motion.

As demonstrated by Price's statement of the Question Presented, the case that Price articulated in the Texas appellate courts likewise did not question the validity of the ethics ordinance on First Amendment grounds.[2] In-

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[2] As indicated in the intermediate court's opinion (Jurisdictional Statement Exhibit B-1), Price questioned his removal from the Commission in terms of due process and equal protection, but those questions are not presented here.

stead, Price argued in the appellate courts that City incorrectly interpreted or improperly applied the ethics ordinance in contravention of a state statute generally authorizing appearances before the Board of Adjustment. Relevant excerpts from Price's briefs to that effect are printed as Appendices B and C to this motion.

In the intermediate court (who issued the only written opinion), Price's entire briefing on the point that "City's actions denied Price his right of free speech," consisted of the following:

> The right to petition for redress of grievances, presumably including a right to appeal a zoning decision of the local administrators to the Board of Adjustment, is intimately connected with the origin and purpose of the freedom of speech constitutionally guaranteed by the U.S. Const. amend. I and Tex. Const. art. I, § 8. While we are aware of the cases cited by the City for the proposition that the government can place certain limits on the speech of its officials and employees in furtherance of legitimate governmental interests, we would submit that there can be no legitimate interest served by the City *in denying one a right statutorily granted by the State of Texas.* (Emphasis added).[3]

Thus, Price invoked the First Amendment only on the condition that application of the ordinance denied a state statutory right. According to Price in the courts below, state law, if correctly interpreted, precluded applicability of the ordinance to his conduct, and City's reliance on an ordinance rendered inapplicable by state law violated a First Amendment right. The Texas courts held, however, that Price was wrong about state law concerning the asserted ordinance-statute conflict: "[T]he effect of the City's decision, however, was not to deny Price his statu-

---

[3] Price's First Amendment briefing in the Supreme Court of Texas, which denied Price's application for writ of error without issuing an opinion, expanded the argument only slightly.

tory right. . . ."[4] *See* Jurisdictional Statement Exhibit B-1 at App. 5.

ARGUMENT

I. The Question Presented Is Not Within The Court's Appeal Jurisdiction, And, Since Price's First Amendment Argument Was Resolved In The Courts Below By An Interpretation Of State Law, The Case Is Not Within Writ Of Certiorari Jurisdiction.

The Question Presented in Price's Jurisdictional Statement is:

> Did the courts below err in holding that appellant Price's First Amendment rights to freedom of speech and to petition for redress of grievances were not violated by the City's action in removing Price from office, pursuant to its "ethics" ordinance, for appearing and speaking before a quasi-judicial body to seek zoning variances on his own property?

Price correctly refrained from characterizing the question as whether the Texas courts erred in upholding the validity of the ordinance against a First Amendment attack. Since Price did not make such an attack, the Question Presented is not within the appeal jurisdiction granted by 28 U.S.C. § 1257(2).

It is essential to the appeal jurisdiction cited by Price that there be an explicit insistence in the state court that a city ordinance is repugnant to the federal Constitution. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n.4, 100 S. Ct. 2814, 2820 n.4, 65 L.Ed.2d 973, 980 n.4 (1980). Appeal jurisdiction is absent here not merely because Price failed to so insist but because, as

---

[4] Although this holding was expressed in response to one of Price's due process arguments, it necessarily resolved the question of state law interpretation that Price's brief depicted as "a key issue in this lawsuit." *See* App. B.

noted in the Statement of Facts, Price explicitly disavowed a claim of constitutional invalidity.[5]

Rather than contending that the ordinance was repugnant to the First Amendment, Price argued unsuccessfully that City acted in reliance on an ordinance that was repugnant to a state statute. But, " 'an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority. . . .' " *Richmond Newspapers, Inc. v. Virginia*, *supra* (quoting *Phillips v. United States*, 312 U.S. 246, 252, 61 S. Ct. 480, 484, 85 L.Ed. 800, 805 (1941)). Price failed to explicitly attack the constitutional validity of the ordinance in the proceedings below, and the Question Presented in Price's Jurisdictional Statement does not even contemplate a holding within appeal jurisdiction. These circumstances require dismissal of the appeal. *See id.; Charleston Fed. Sav. & Loan Ass'n*, 325 U.S. 182, 187, 65 S. Ct. 624, 627-28, 89 L.Ed. 857, 861-62 (1945).

Moreover, Price's case does not reach petition for writ of certiorari jurisdiction, because Price did not contend in the lower courts that City's removal in reliance on a *state-valid* ordinance deprived him of a First Amendment right. *See Cardinale v. State of Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 22 L.Ed.2d 398, 400 (1969) (jurisdiction absent with respect to federal question first presented in this Court). All of Price's arguments in the lower courts, including his First Amendment assertion conditioned on ordinance-statute conflict, were resolved by the Texas court's determination that the ordinance was not in conflict with the statute.

---

[5] The facts leave no room for a significant distinction between facial invalidity and possible invalidity "as applied" to Price. Price's complaint about the ordinance applies "across the board." By its terms, the ordinance could not be applied to Price any differently than it could be to any other city official. Thus, in the absence of a constitutional challenge to its validity "as written," there is no constitutional challenge to its validity.

The state law question about purported ordinance-statute conflict was an unfulfilled predicate to Price's tangential First Amendment proposition. This Court has no certiorari jurisdiction to review the state law determination that eliminated a link presumed by Price's First Amendment argument to be present. *See Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 488, 96 S. Ct. 2308, 49 L.Ed.2d 1, 7 (1976) (Court bound by highest state court's interpretation of state law). Since Price's First Amendment reliance was conditioned on a different resolution of the state law question, "[t]he case, in effect, was disposed of before the federal question said to be involved was reached." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S. Ct. 183, 80 L.Ed. 158, 160 (1935). Since resolution of the state law question made consideration of Price's First Amendment claim unnecessary, the case is not within certiorari jurisdiction. *Id.*

II. The Texas Court's Decision Does Not Present A Substantial Federal Question.

As demonstrated by the foregoing, Price's discussion under "Substantial Nature of Question Presented" describes a case different from the one put to the Texas courts. Part A under that heading addresses a "constitutional right to appear and speak before the Zoning Board of Adjustment" and suggests that the very enactment of the ordinance abridged a right of free expression in that respect. Price's posture in the courts below was just the opposite. He disclaimed a challenge to the validity of the ordinance and stated that he did not "question the City's general purpose in adopting and enforcing the Ethics Ordinance." *See* Appendices A, B and C. Certainly to this extent, jurisdiction fails because, clearly, the supposed unconstitutionality of the ordinance itself is being raised here for the first time. *See Cardinale v. State of Louisiana, supra.*

In any event, the sanctity of the right to speak and to petition is not at issue The state Board of Adjustment statute enables the exercise of those rights, and the ordinance does not thwart it. This case is in no way analogous to the fundamentally infringing anti-sedition oath and patronage discharge practice that were stricken respectively in *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L.Ed.2d 629 (1967) and *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976).

The actual right claimed by Price to have been abridged is far narrower than the First Amendment rights to speak, to petition the government and to obtain access to courts. Indeed, it is not a right of constitutional dimension. Price's argument, of course, operates under an assumption that the First Amendment guarantees a right to appear *pro se* before a civil administrative agency. In support of that assumption, Price cites *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975), in which the court held that a defendant in a criminal case has a right under the Sixth Amendment to conduct his own defense. Obviously, that is an altogether different matter. Based on the discussion in *Faretta*, the Fifth Circuit correctly held in *Eitel v. Holland*, 797 F.2d 995 (5th Cir.), *modified on other grounds*, 798 F.2d 815 (5th Cir. 1986), that there is no due process right "to represent oneself in a civil case." *Id.* at 998. *See also Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 137 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986) ("There is no constitutional right to self-representation in civil cases").

A decision on which even Price relies, *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972), explains that the Constitution guarantees "right of access to agencies and courts, *within the limits, of course, of their prescribed procedures* . . ." (emphasis added). *Id.*, 404 U.S. at 515,

92 S. Ct. at 614, 30 L.Ed.2d at 648. The Question Presented is not a substantial federal question, because it is based on a purported right that is not afforded by the First Amendment.

III. The Texas Court's Decision Is In Conformity With Prior Decisions Of This Court.

City's ethics ordinance did not at all proscribe the exercise of First Amendment rights. For the purpose of avoiding conflicts of interest and the appearance of impropriety and self-dealing, the ordinance placed a fair and reasonable restriction only on the method by which those rights are exercised. Contrary to Price's argument, the methods of exercising a First Amendment right to seek redress are not inherently free from procedural restrictions or "balancing" factors. In *California Motor Transp. Co. v. Trucking Unlimited*, *supra*, the court recognized not only that the constitutional "right of access to agencies and courts" was subject to forum procedure, but also that the First Amendment right itself was not immunized from regulation that furthered a legitimate government interest. Anti-trust violations committed through repetitive baseless petitions were held to be actionable despite the broad First Amendment right to seek agency redress. *Id.*, 404 U.S. at 514, 92 S. Ct. at 613, 30 L.Ed.2d at 648.

Price correctly observes that, as held in *McCoy v. Goldin*, 598 F. Supp. 310 (S.D. N.Y. 1984), the fundamental right to petition the government was not at issue in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983). The ordinance, however, simply did not deprive Price of his right to petition. In fact, the ordinance could have deprived him of no more than a non-constitutional statutory right to represent himself, and the Texas court held that the ordinance did not even deny a statutory right. All that remains, therefore, is Price's general claim that City wrongfully removed him

for exercising the right to speech. For that reason, the Texas court correctly applied the *Connick* criteria.

In this context of a relationship between a public employee's speech and termination of employment, the *Connick* distinction between speech of private and public concern and the *Connick* balancing of public concerned speech against the government employer's interest are determinative.[6] The Texas court held that Price's speech about his own property was a matter of private concern. Based on "the content, form, and context . . . as revealed by the record as a whole," that decision was correct, and there was no need to reach the balancing test. *Id.*, 461 U.S. at 147-48, 103 S. Ct. at 1690, 75 L.Ed.2d at 720.

Even if, as Price contends, his speech about personal zoning requests was a matter of public concern, the lower court balanced state interests in a due process discussion that effectively applied the *Connick* test. Jurisdictional Statement Exhibit B-1 at App. 4. With respect to speech concerning public matters, according to *Connick*, the First Amendment requires a balancing of the employee's right to speak freely and the government employer's interest in the "effective and efficient fulfillment of its responsibilities to the public." 461 U.S. at 150, 103 S. Ct. at 1692, 75 L.Ed.2d at 719-22. In *Rankin v. McPherson*, 483 U.S. ——, 107 S. Ct. 2891, 97 L.Ed.2d 315 (1987), the balancing factors were recently reiterated:

> We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary,

---

[6] Price's discussions of the role of state interest in other contexts (Part C) and the so-called right/privilege distinction (Part D), which the lower court actually employed as a determinant of state law, are either inapplicable or subsumed by *Connick* principles.

> or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. (Citation omitted).
>
> These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.

Id. at 97 L.Ed.2d 327.

By definition, government ethics codes go to the very heart of the state interest described in *Connick*: "effective and efficient fulfillment of [a government's] responsibilities to the public." The Ethics Review Commission recommended Price's removal to avoid "setting a precedent in which members of the city government would feel that they were not bound by the City's ordinance." City clearly established in the lower courts that its removal of Price from the commission was based on an overriding state interest recognized in *Rankin*.

CONCLUSION

The Question Presented in this appeal is not within the court's jurisdiction. In any event, Price has not presented a substantial federal question worthy of review. Appellees respectfully pray, therefore, that the appeal be dismissed or that the judgment of the lower court be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE DISTRICT COURT
OF HAYS COUNTY, TEXAS
274TH JUDICIAL DISTRICT

No. 14,532

PATRICK W. PRICE

vs.

THE CITY OF SAN MARCOS, TEXAS, *et al.*

PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES PATRICK W. PRICE, Plaintiff in the above styled and numbered cause, and files this his Plaintiff's First Amended Petition complaining of and against the CITY OF SAN MARCOS, TEXAS, . . .

* * * *

V.

Plaintiff does not complain of the City's Code of Ethics as written. Plaintiff would show, however, that with respect to representation of oneself before the Board of Adjustment, the prohibition against pro se representation contained in Sec. 2-73(b)(1) of the Code of Ethics of the City of San Marcos does not apply as a matter of State law. Boards of Adjustment are governed by the provisions of TEX. REV. CIV. STAT. ANN. Art. 1011g, one of the series of statutes comprising the Texas zoning

enabling legislation. Section (f) of Art. 1011g provides as follows:

> "(f) The Board of Adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. *Upon the hearing any party may appear in person or by agent or by attorney.*" (emphasis added)

Plaintiff would show that the right of any party in a proceeding before the Board of Adjustment to appear in person to represent his own property interests is a statutorily granted right. The Defendants' interpretation and application of the Code of Ethics is in conflict therewith and such application to Plaintiff is prohibited by TEX. REV. CIV. STAT. ANN. Art. 1165 and Art. XI, § 5 of the Texas Constitution. Plaintiff was removed from office for exercising a statutorily granted right.

* * * *

XI.

Plaintiff would show that in removing him from the City Planning Commission, Defendants were arbitrary, capricious, discriminatory and unreasonable; that Defendants unlawfully deprived him of his liberty interest, his property inteerst or other constitutionally protectible interest in his office; that Defendants denied him his right to equal protection under the laws; and that Defendants denied him his right to freedom of speech.

APPENDIX B

IN THE COURT OF APPEALS
FOR THE THIRD SUPREME JUDICIAL
DISTRICT OF TEXAS
AUSTIN, TEXAS

No. 14,720

PATRICK W. PRICE,
Appellant,

vs.

THE CITY OF SAN MARCOS, *et al.*,
Appellees.

BRIEF FOR APPELLANT

* * * *

SUBPOINT A. Price had a statutorily granted right to represent himself at the Board of Adjustment.

Tex. Rev. Civ. Stat. Ann., Art. 1011a, *et seq*, comprise the Texas Zoning Enabling Act wherein the Legislature expressly conferred the power of zoning on Texas cities. One of the statutes in this series, Art. 1011g, provides for the appointment of a quasi-judicial body known as the Board of Adjustment. The Board of Adjustment is authorized by the statute to grant special exceptions and variances from a city's zoning ordinance under the appropriate circumstances. Matters reach the Board of Adjustment on appeal from the administrative ruling of the officer of the city charged with enforcing the zoning ordinance, typically the building inspector, that a use or structure cannot be permitted because of non-compliance with the strict application of the terms of the zoning ordinance.

The statute prescribes certain procedures to be followed on appeal to the Board of Adjustment. Section (f) of Art. 1011g provides as follows:

> (f) The Board of Adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. *Upon the hearing any party may appear in person or by agent or by attorney.*

(Emphasis added.)

Price submits to this Court that the last sentence of Section (f) of Art. 1011g confers upon him, and any other property owner who may take an appeal to the Board of Adjustment, a right to self-representation before the Board with respect to his own property. Price's appearances before the Board of Adjustment were an exercise of that statutory right.

The Court's interpretation of Section (f) of Art. 1011g is a key issue in this lawsuit.

* * * *

SUBPOINT B. The City's interpretation and application of its Ethics Ordinance to Price is contrary to State law and therefore legally erroneous.

* * * *

It is a well known principle of Texas municipal law that a city charter or ordinance provision may not be inconsistent with the laws of the State. Tex. Rev. Civ. Stat. Ann., Art. 1165; Tex. Const. art. XI, § 5.

The City's interpretation and application of the above cited provisions of its Ethics Ordinance have the effect of denying one the right of self-representation provided for by Tex. Rev. Civ. Stat. Ann., Art. 1011g(f) in Board of Adjustment proceedings. The City's application of that prohibition to Price under the facts of this case is therefore legally impermissible. With respect to repre-

sentation of oneself before the Board of Adjustment, the prohibition against *pro se* representation contained in Sec. 2-73(b)(1) of the City Code does not apply as a matter of State law.

Price does not complain of the City's Ethics Ordinance as written. Indeed, the Ethics Ordinance as written contains language contrary to the City's application of the ordinance in this case.

* * * *

. . . Price does not question the City's general purpose in adopting and enforcing the Ethics Ordinance . . .

APPENDIX C

IN THE SUPREME COURT OF TEXAS

No. C-7320

PATRICK W. PRICE,

Petitioner

v.

THE CITY OF SAN MARCOS, *et al.*,

Respondents

PETITIONER'S APPLICATION FOR WRIT OF ERROR

* * * *

POINT OF ERROR NO. 1

THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE CITY'S INTERPRETATION AND APPLICATION OF ITS ORDINANCE TO PRICE UNDER THE FACTS OF THIS CASE WERE INCONSISTENT WITH PRICE'S STATUTORILY GRANTED RIGHT OF SELF REPRESENTATION UNDER TEX. REV. CIV. STAT. ANN., art. 1011g AND, THEREFORE, IMPERMISSIBLE AND VOID UNDER TEX. CONST. art. XI, § 5 AND TEX. REV. CIV. STAT. ANN., art. 1165.

* * * *

Argument

The court of appeal's opinion of January 20, 1988, correctly acknowledges that TEX. REV. CIV. STAT. ANN., art. 1011g(f) grants Price a statutory right of self representation before the Board of Adjustment.

TEX. CONST. art. XI, § 5 and TEX. REV. CIV. STAT. ANN. art. 1165, both of which apply even to home-rule cities such as San Marcos, clearly provide that no city charter or ordinance "shall contain any provision inconsistent with" the State Constitution or general laws of the State.

* * * *

There is an obvious inconsistency between TEX. REV. CIV. STAT. ANN., art. 1011g(f) which grants a right of self representation to "any party" to a proceeding before the Board of Adjustment, and the City's interpretation of its ordinance as prohibiting parties to such proceedings who also happen to serve on some city commission from exercising this statutory right. While the City's ordinance may be a well-intentioned ordinance and generally valid, the general prohibition on *pro se* representation must in this instance give way to the superior State law which governs the right of self representation before this particular quasi-judicial City board, the Board of Adjustment. Any such inconsistent interpretation or application is impermissible and void.

* * * *

The City's interpretation and application of the above cited provisions of its ordinance have the effect of denying one the right of self representation provided for by TEX. REV. CIV. STAT. ANN., art. 1011g(f) in Board of Adjustment proceedings. The City's application of that prohibition to Price under the facts of this case is therefore legally impermissible. With respect to representation of oneself before the Board of Adjustment, the prohibition against *pro se* representation contained in Sec. 2-73(b)(1) of the City Code does not apply as a matter of State law.

Price does not complain of the City's ordinance as written. Indeed, the ordinance as written contains language contrary to the City's application of the ordinance in this case.

* * * *

The City's application of the ordinance to Price's *pro se* appearances at the Board of Adjustment is invalid because it is inconsistent with State law. . . . Price does not question the City's general purpose in adopting and enforcing the ordinance . . . .